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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1693

CLIFTON L. BRIGHAM AND JANE G. BRIGHAM, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

REPLY TO THE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES.

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On or about September 17, 1973, the United States filed an unusual supplemental memorandum with this Court opposing the Petitioners' request for a Writ of Certiorari. The United States asserts that the concession it made in the United States Court of Claims for the purpose of obtaining the Judgment on the Pleadings sought by the United States does not preclude it from disregarding that concession for the purpose of avoiding this Court's grant of the Writ requested by Petitioners. We submit the position of the United States is erroneous.

Petitioners' suit for refund is barred by the ordinary Statute of Limitations set forth in Section 6511 of the Internal Revenue Code of 1954, 26 U. S. C. 6511. However, the United States admits in its supplemental memorandum (p. 1), that this

Statute of Limitations is inapplicable to a factual situation encompassed by the mitigation provisions of Sections 1311 through 1315 of the Internal Revenue Code of 1954.

Petitioners contend the facts of this case are within the ambit of these mitigation provisions. In the United States Court of Claims, the Government denied Petitioners' contention and moved for Judgment on the Pleadings. The United States conceded that all the prerequisites for the application of the mitigation provisions had been met with the sole exception that the Commissioner had not maintained inconsistent positions (Gov. Br. at p. 7).[1] Based upon its summary review of the facts as determined from the allegations contained in the pleadings, the United States Court of Claims determined that the Commissioner had not "maintained inconsistent positions" and granted Judgment on the Pleadings to the United States.

Petitioners contend that the decision of the Court of Claims is erroneous. It is contrary to the law as established by several prior decisions of the United States Circuit Courts of Appeal. Moreover, the Court prejudged the facts without affording the Petitioners adequate opportunity to present evidence with respect to the facts. A Writ of Certiorari has been applied for on this basis, in addition to other grounds not discussed in the Supplemental Memorandum filed by the United States. (See Petition for Writ of Certiorari to the United States Court of Claims, pp. 6-10.)

In opposing this Court's granting of a Writ of Certiorari, the United States now asserts that a concession it made before the

1. A copy of the Brief for the United States in Support of its Motion for Judgment on the Pleadings in the United States Court of Claims has been lodged with the Clerk of this Court by the United States. (See Supplemental Memorandum for the United States p. 2, n. 1.)

Court of Claims was permature. For the purpose of obtaining its Judgment on the Pleadings the United States admitted that the Commissioner's determination affected the basis of the property involved. (See Brief for the United States in Opposition, p. 4, footnote 2, See also Pet. App. C pp. 5-6.) Now, without the citation of any authority, the United States contends that its concession before the United States Court of Claims does no preclude the United States from raising this matter as an issue "in further proceedings if any, before the Court of Claims, or in opposing certiorari. . . ." (Supplemental Memorandum for the United States, p. 2.)

Petitioners respectfully submit that for purposes of upholding the propriety of the Judgment on the Pleadings awarded the United States, the United States may not raise an issue which it conceded in the course of obtaining that Judgment.[2]

Finally, the decision of the Court of Claims was based upon the sole ground that the Commissioner did not maintain an in-

2. Perhaps in further proceedings, after the denial of the Motion for Judgment on the Pleadings, the United States might disregard its admission.

Moreover, contrary to Respondent's observation (See Supplemental Memorandum for the United States, p. 2), the Court of Claims did reach this question but due to Respondent's concession, it assumed the prerequisite had been met (Pet. App. C. pp. 5-6). Accordingly, Petitioners have not had an opportunity to prove before the United States Court of Claims that the basis of property involved was affected. Nevertheless, the contention was made as a necessary incident of relief requested by Petitioner. Without such contention, there was no reason for the Government to state in its Brief, "assum[ing] arguendo, that [the] requirements [of Section 1312] have been met". (Brief for the United States in Support of its Motion for Judgment on the Pleadings, p. 7.)

Moreover, it is obvious the basis of the property is affected. The continued treatment of the receipts at issue as dividend income for the years 1958 through 1961, inclusive, precludes the treatment of these receipts as proceeds from the sale of stock, as these proceeds have been consistently treated by the Commissioner from 1952 to 1957 and since 1962. Accordingly, these payments may not be used to increase the basis of the stock for which they are payment. Thus, the provisions of Section 1312, in fact, are met.

consistent position. The United States continues in its failure to even discuss the reason the decision of the Court of Claims was not contrary to the law established by other Circuits. (See Pet. p. 6; *United States* v. *Rachal*, 312 F. 2d 376 (5th Cir., (1962); *Gant* v. *United States*, 441 F. 2d 1130 (5th Cir. 1971); *Oklahoma Gas and Electric* v. *United States*, 72-2 USTC ¶ 9638 (10th Cir., 1972).

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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